



INDUSTRY CIRCULAR

DEPARTMENT OF THE TREASURY

Bureau of Alcohol, Tobacco and Firearms
Washington, D. C. 20226

Number: 95-1

Date: 01-19-95

DIVERSION OF DISTILLED SPIRITS FOR PURPOSES OF SMUGGLING

Proprietors of Distilled Spirits Plants (DSPs),
Importers, Wholesalers And Other Persons Who
Purchase Distilled Spirits Products From DSPs

PURPOSE. This circular reminds proprietors of distilled spirits plants (DSPs), importers, wholesalers and other persons who purchase distilled spirits products from DSPs of their responsibility to comply with all applicable Federal and state laws with respect to such sales. The sale of distilled spirits to people to whom such sales cannot legally be made and the diversion of such distilled spirits from their destination of record to other destinations in the United States or Canada can violate laws set forth in the Internal Revenue Code (IRC), the Federal Alcohol Administration (FAA) Act, the 21st Amendment, the Webb-Kenyon Act, the Federal Criminal Code, Federal Indian laws, and/or applicable state laws.

BACKGROUND. Recently, ATF has encountered a number of situations in which DSPs have submitted evidence of exportation and/or names of consignees which were materially incorrect or, in some cases, fraudulent. In some situations, distilled spirits were withdrawn from bond for exportation with paperwork indicating overseas shipment. They were, in fact, smuggled into Canada. In other cases, non-taxpaid spirits were discovered remaining illegally in the United States. This circular reminds all parties involved in the sale and purchase of distilled spirits to use good commercial judgment when engaging in transactions in distilled spirits in interstate and foreign commerce. It reminds parties to such transactions of their potential tax, civil and criminal penalties in situations where the documentation on such removals list false consignees and/or the spirits are diverted from legitimate export channels prior to actual exportation. This circular finally addresses the sale of distilled spirits shipped into states in violation of state laws and the implications of sales to purchasers on Indian reservations.

INTERNAL REVENUE CODE (IRC)

Section 5001 of the Internal Revenue Code (IRC) imposes a tax on all distilled spirits produced in or imported into the United States. Pursuant to section 5005, the importer of distilled spirits is liable for the tax on such imported spirits. Similarly, the proprietor of a DSP is liable for the tax on the distilled spirits produced or stored on the bonded premises of the DSP. Section 5214(a)(4) provides that distilled spirits on which the internal revenue tax has not been paid or determined may be withdrawn from the bonded premises of any distilled spirits plant without payment of tax for exportation, after filing such bonds as are required by section 5175 and complying with such other requirements as may be prescribed by regulation. Section 5214(a)(9) provides that distilled spirits on which the internal revenue tax has not been paid or determined may be withdrawn from the bonded premises of any distilled spirits plant without payment of tax for transfer (for the purpose of storage pending exportation) to any Customs bonded warehouse from which distilled spirits **may** be exported, provided that such spirits are entered,

stored, and accounted for pursuant to regulatory and bond requirements promulgated by ATF. Persons wishing to export distilled spirits without payment of tax must file a bond with ATF and apply for permission to withdraw the spirits by filing ATF Form 5100.11, Withdrawal of Spirits, Specially Denatured Spirits, or Wines for Exportation.

Pursuant to section 5005(e)(1), any person who withdraws distilled spirits from the bonded premises of a DSP without payment of tax as provided, in pertinent part, in section 5214(a)(4) and (9), shall be liable for the internal revenue tax on such distilled spirits from the time of such withdrawal. Pursuant to section 5005(e)(2), all persons liable for the tax on distilled spirits under section 5005(e)(1) shall be relieved of any liability at the time, in pertinent part, the distilled spirits are exported from the United States, deposited in a foreign-trade zone, or deposited in Customs bonded warehouses. The regulations concerning the records required to document the direct exportation of distilled spirits without payment of tax are set forth at 27 C.F.R. §§ 252.40 and 252.250 - 269. These regulations state that the exportation of any shipment of distilled spirits may be evidenced by a copy of the export bill of lading, or in lieu thereof, a copy of the railway express receipt, a copy of the air express receipt, a copy of the through bill of lading where exportation is to a contiguous foreign country, or a certificate by the export carrier. These bills of lading, or other records, must correctly contain the name of the exporter, the name and address of the foreign consignee, the number of packages or cases, the serial number of the ATF Form 5100.11, and the total quantity of spirits in wine gallons or liters. Proprietors are further reminded that the regulations specify that they must maintain records of disposition which contain, among other things, the name and address of the consignee and the quantity of distilled spirits involved in each transaction. See 27 C.F.R. §§ 19.731 - 792.

Regulations regarding foreign-trade zones are set forth in 27 C.F.R. § 252.30. Regulations regarding Customs bonded warehouses are set forth in 27 C.F.R. §§ 252.26 - 28. Persons utilizing foreign-trade zones and Customs bonded warehouses must also comply with the requirements of 19 C.F.R. Chapter I.

The procedures for the withdrawal of spirits by a proprietor or other person for export are more fully set forth in Industry Circular No. 94-1, titled, "Documenting The Exportation of Liquors," dated April 14, 1994.

Proprietors, importers, wholesalers and other interested parties should familiarize themselves with the provisions of 27 C.F.R. 252 and not merely rely on the general summary of such provisions set forth in this Industry Circular and Industry Circular No. 94-1.

The resale in the United States of distilled spirits purchased from a DSP will render the seller liable for special tax either as a wholesale liquor dealer under section 5111 of the IRC or as a retail liquor dealer under section 5121 of the IRC. A wholesaler dealer in liquors is defined in section 5112(b) as any dealer, other than a wholesale dealer in beer, who sells, or offers for sale, distilled spirits, wine, or beer, to another dealer. If any entity is making sales to entities which qualify as "dealers" under the IRC, then it is liable for special tax as a wholesale liquor dealer. Importers engaged in such sales are in fact wholesale liquor dealers.

If an entity is only making sales to individuals or foreign trade buyers who do not qualify as "dealers" under the IRC, then it is merely liable for special tax as a retail liquor dealer pursuant to section 5121. A retail dealer in liquors is defined in section 5122(a) as any dealer, other than a retail dealer in beer, who sells, or offers for sale, any distilled spirits, wine or beer, to any person other than a dealer. Pursuant to section 5691(b), a person selling more than 20 wine gallons of distilled spirits at one time is presumed to be a wholesale liquor dealer. Section 5691(b) further provides that this presumption may be overcome by evidence satisfactorily showing that such sale was made to a person other than a dealer.

Wholesale and retail liquor dealers are also reminded of the recordkeeping requirements imposed by the IRC with respect to the receipt and/or disposition of distilled spirits. The recordkeeping requirements made applicable to wholesale dealers in distilled spirits (including importers) are set forth in 27 C.F.R. §§ 194.225 - 226. Section 194.225(a) requires wholesale dealers in distilled spirits to maintain a daily record of the physical receipt of each individual lot of distilled spirits, which record shall, among other things, show the name and address of consignor and the quantity of distilled spirits actually received. Section 194.226(a) requires wholesale dealers in distilled spirits to prepare daily records of the physical disposition of each individual lot of distilled spirits showing, among other things, the name and address of the consignee and the number of packages and cases by size of bottle.

The recordkeeping requirements made applicable to retail dealers in distilled spirits are set forth in 27 C.F.R. § 194.234. Section 194.234(a) requires retail dealers in distilled spirits to maintain a daily record of the receipt of the quantity of distilled spirits received and from whom such spirits are received. Section 194.226(b) requires retail dealers in distilled spirits who make sales of spirits in quantities of 20 wine gallons or more to the same person at the same time to prepare daily records of the physical disposition of each individual lot of distilled spirits showing, among other things, the name and address of the purchaser and the kind and quantity of each kind of spirits sold.

If ATF determines that evidence of exportation is materially incorrect or fraudulent, and that the spirits were not exported as reported, ATF will immediately take steps to assess all applicable taxes, interest, and penalties. Other civil and criminal penalties may also be imposed for unlawfully removing or concealing shipments of distilled spirits, defrauding the United States of the tax on spirits, or committing fraudulent noncompliance relating to any required record, return, report, summary, transcript, or other document. Persons undertaking this conduct could be subject to the criminal penalties set forth in 26 U.S.C. §§ 5601, 5602, 5603, 5687, and 5691. Violations of sections 5601, 5602, 5603, 5687, and 5691 are punishable by imprisonment and/or monetary fines. Proprietors, importers, and wholesalers should also note that the knowing falsification or fraudulent execution of these records is punishable by imprisonment and/or fines pursuant to 18 U.S.C. § 1001.

Proprietors, importers, and wholesalers are cautioned that it is also illegal to aid and abet violations of the IRC. Pursuant to the provisions of 18 U.S.C. § 2, any person who aids and abets the commission of an offense against the United States is punishable as a principal.

FEDERAL ALCOHOL ADMINISTRATION ACT (FAA ACT)

Proprietors, importers, and wholesalers are reminded that their basic permits are conditioned upon compliance with all Federal laws relating to distilled spirits, including taxes with respect thereto. The willful failure to comply with all IRC payment and recordkeeping requirements may be grounds for suspension or revocation of a proprietor's, importer's and/or wholesaler's basic permit.

Section 203(c) of the FAA Act, provides that persons who engage in the business of purchasing for resale at wholesale distilled spirits, wine, or malt beverages must obtain a wholesaler's basic permit. The regulations define the term "resale at wholesale" as a sale to a trade buyer. The term "trade buyer" is defined, in pertinent part, as any person who is a wholesaler or retailer of distilled spirits. 27 C.F.R. § 1.5. Therefore, an entity which purchases domestic distilled spirits for resale at wholesale to either foreign or domestic trade buyers would be required to obtain a wholesaler's basic permit pursuant to section 203(c).

VIOLATIONS OF STATE LAWS

Proprietors, importers, and wholesalers are also reminded that their basic permits are conditioned upon compliance with the 21st Amendment and laws relating to the enforcement thereof. The 21st Amendment prohibits the transportation or importation into any state, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof. Section 202(b) of the Liquor Law Repeal and Enforcement Act, 27 U.S.C. § 122, (popularly known as the Webb-Kenyon Act), was enacted relative to the adoption of the 21st Amendment and is, in effect, a statutory declaration of the constitutional prohibition. Section 122 provides, in pertinent part, that:

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State ... into any other State ... which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State ... is hereby prohibited.

Although there are no criminal or civil penalties associated with either the 21st Amendment or the Webb-Kenyon Act, compliance with these provisions is a condition of the basic permit. Thus, violations of these provisions arising from violations of state law, either directly or as an aider or abettor, could result in suspension or revocation of a proprietor's, importer's and/or wholesaler's basic permit. ATF recommends that proprietors, importers, and wholesalers contact the relevant state taxation and alcoholic beverage authorities with any questions regarding the legality of sales of spirits within their borders.

SALES TO INDIAN RESERVATIONS

Proprietors, importers, and wholesalers are also directed to the provisions of Title 18, Chapter 53, United States Code, which restrict the transportation of alcoholic beverages into Indian country. Section 1151 defines Indian country as all land within the limits of any Indian reservation under the jurisdiction of the United States Government and all dependent Indian communities within the borders of the United States. Section 1154 prohibits the sale or other disposition of alcoholic beverages in Indian country (except for scientific, sacramental, medicinal, or mechanical purposes) and section 1156 prohibits the possession (except for scientific, sacramental, medicinal, or mechanical purposes) of alcoholic beverages in Indian country. Section 1161 provides, in pertinent part, that sections 1154 and 1156, shall not apply to any act or transaction within the Indian country provided that such act or transaction is in conformity with both the laws of the state in question and with an ordinance duly adopted by the tribe having jurisdiction over such area of Indian country, certified by the Secretary of the Interior, and published in the Federal Register. Proprietors, importers, and wholesalers are cautioned that the adoption of a Tribal Ordinance, even if certified by the Secretary of the Interior and published in the Federal Register, does not obviate the requirement that sales of distilled spirits be in accordance with state law and the Ordinance itself.

These provisions are Federal laws relating to distilled spirits, wine, and malt beverages. Thus, violations of these provisions, either directly or as an aider or abettor, could result in suspension or revocation of a proprietor's, importer's, and/or wholesaler's basic permit pursuant to section 204(e). In addition, the criminal penalty for violations of sections 1154 and/or 1156, either directly or as an aider or abettor, could result in imprisonment and/or a monetary fine.

ATF recommends that proprietors, importers, and wholesalers contact the Bureau of Indian Affairs, Department of the Interior, with any questions regarding the applicability of the above-cited Title 18 provisions and any other provisions relative to the sale of spirits within Indian country.

ATF finally urges all proprietors, importers, and wholesalers to exercise caution when faced with transactions which lend themselves to any of the violations described above. We reiterate the need that all industry members ensure that spirits which are withdrawn from bonded premises are legitimately exported. Likewise, all industry members are strongly urged to create and maintain all required records relative to the disposition and exportation of distilled spirits.

INQUIRIES, Inquiries concerning this circular should refer to its number and be addressed to the Chief, Alcohol and Tobacco Programs Division, Bureau of Alcohol, Tobacco and Firearms, 650 Massachusetts Avenue, N.W., Washington, D.C. 20226.


Director